STATE OF MICHIGAN

COURT OF APPEALS

JAMES E. ROBINS, JR., Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED December 22, 2005
v	No. 258270 Wayne Circuit Court
EPI PRINTERS, INC., Defendant-Appellant/Cross-Appellee.	LC No. 02-241160-CK

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In this breach of contract case, defendant EPI Printers, Inc., appeals as of right a judgment in favor of plaintiff in the amount of $380,593.38. Plaintiff James E. Robins, Jr., cross-appeals as of right the judgment. We reverse the judgment of the trial court.

I. FACTS

Defendant is in the business of preparing and distributing printed materials, such as booklets, pamphlets, and owner's manuals. Plaintiff has been in the commercial printing business for over forty-five years and formerly owned a commercial printing business. Over the years, plaintiff's business sold millions of dollars in printing services to Ford Motor Company (Ford). In 1992, defendant purchased plaintiff's commercial printing business. The same year, defendant and Robins Graphics, Inc., a corporation wholly owned, controlled and managed by plaintiff, entered into a marketing agreement. Under the marketing agreement, which apparently was entered into to take advantage of plaintiff's business relationship with Ford and other businesses, plaintiff contracted to work as a full-time sales representative for defendant. The marketing agreement was not an employment contract, however, and plaintiff was an independent subcontractor, and not an employee of defendant at this time. Under the marketing agreement, defendant agreed to pay plaintiff a commission of seven percent on the gross amount of sales billed by defendant that were the result of plaintiff's efforts. The marketing agreement contained an arbitration provision, which provided: "Any controversy or claim arising out of, or relating to this Agreement, or its breach, shall be settled by arbitration in the City of Lansing, Michigan in accordance with the then governing rules of the American Arbitration Association. Judgment upon the award rendered may be entered and enforced in any court of competent jurisdiction."

The marketing agreement was to remain in effect from December 27, 1992, until December 27, 1997. In late 1997, as the end of the term of the marketing agreement approached, the parties prepared for a future business relationship. On November 11, 1997, defendant sent plaintiff a letter offering plaintiff a position of employment as an account representative. In the letter, defendant offered to pay plaintiff a salary of $50,000 a year, as well as three percent commission on plaintiff's sales and one percent commission on all defendant's sales to Ford, even if the sales were not handled by plaintiff. Shortly after defendant sent plaintiff the offer letter, the parties agreed to terminate the marketing agreement, apparently in anticipation of plaintiff becoming an employee of defendant. Therefore, the parties signed an amendment agreement, which terminated the marketing agreement. Defendant signed the amendment agreement on November 17, 1997, and plaintiff signed it on November 25, 1997.

At about the same time the parties terminated the marketing agreement, plaintiff signed a form acknowledging that he had received and read a copy of defendant's employment manual. This form, which plaintiff signed on November 18, 1997, is entitled "Receipt & Acknowledgment of the EPI Printers, Inc. Employment Manual." The receipt and acknowledgment form contained a provision asserting that plaintiff was an at-will employee. The employment manual also contained a provision that permitted defendant to "change, delete, suspend, or discontinue any part or parts of the policies in this Employment Manual . . . [at] any time and without prior notice." Most significantly for this appeal, the receipt and acknowledgment form contained the following provision providing for arbitration of disputes: "I understand that any dispute, matter, or controversy, as set forth in Section 4.07 [of the employment manual], *shall* be settled by arbitration." (Emphasis added). Section 4.07 of defendant's employment manual contained the following arbitration provision, which appeared in bold-faced type and in capital letters:

> ANY DISPUTE, MATTER, OR CONTROVERSY INVOLVING CLAIMS FOR MONETARY DAMAGES AND/OR EMPLOYMENT RELATED MATTERS INCLUDING, BUT NOT LIMITED TO, ANY AND ALL CLAIMS RELATING TO TERMINATION OF EMPLOYMENT AND DISCRIMINATION SHALL BE ARBITRATED PURSUANT TO THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION. EITHER PARTY MUST DEMAND ARBITRATION WITHIN ONE YEAR AFTER THE CONTROVERSY ARISES BY SENDING A NOTICE OF DEMAND TO ARBITRATE TO THE AMERICAN ARBITRATION ASSOCIATION WITH A COPY TO THE OTHER PARTY. THE DISPUTE SHALL THEN BE ARBITRATED BY AN ARBITRATOR PURSUANT TO THE *EMPLOYMENT DISPUTE RESOLUTION RULES* OF THE AMERICAN ARBITRATION ASSOCIATION. THE ARBITRATION SHALL TAKE PLACE AT THE OFFICE OF [DEFENDANT] IN BATTLE CREEK, MICHIGAN. IN THE DISPOSITION OF THE DISPUTE, THE ARBITRATOR SHALL BE GOVERNED BY THE EXPRESS TERMS OF THIS EMPLOYMENT MANUAL AND OTHERWISE BY THE LAWS OF THE STATE OF MICHIGAN WHICH SHALL GOVERN THE INTERPRETATION OF THE EMPLOYMENT MANUAL. THE DECISION OF THE ARBITRATOR SHALL BE FINAL AND SHALL BAR ANY SUIT, ACTION, OR PROCEEDING INSTITUTED IN ANY FEDERAL, STATE, OR BEFORE ANY

> ADMINISTRATIVE TRIBUNAL. JUDGMENT ON ANY AWARD BY THE ARBITRATOR MAY BE ENTERED IN ANY COURT OF COMPETENT JURISDICTION. [Italics in original.]

On August 16, 2002, defendant terminated plaintiff's employment. Plaintiff filed a complaint against defendant alleging, among other claims, breach of contract under the marketing agreement and breach of what it characterized as the employment agreement. In addition, the complaint sought punitive damages, attorney fees and costs under the Sales Representative Commissions Act (SRCA), MCL 600.2961, due to defendant's alleged failure to pay plaintiff's commission.

Defendant moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's claims were "barred because of an agreement to arbitrate." The trial court denied the motion. In denying the motion, the trial court stated on the record that the arbitration agreement (the trial court did not specify which arbitration provision) was "clearly unenforceable" and that defendant's motion for summary disposition was "clearly without merit." In making its ruling, the trial court relied on our Supreme Court's opinion in *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405; 550 NW2d 243 (1996) (opinion by Cavanagh, J.) Defendant moved for reconsideration, and the trial court denied the motion.

Following a jury trial, the jury returned a verdict in favor of plaintiff in the amount of $169,252. Of this amount, the jury awarded $52,577 in damages for breach of the marketing agreement and $116,675 for breach of the "offer letter," which the jury determined was a contract. On September 10, 2004, the trial court entered a final judgment in the amount of $380,593.38. The judgment was comprised of $169,252 from the jury verdict, $100,000 for penalties under the SRCA, $19,998.29 for interest, and $91,343.09 for costs and fees under MCR 2.403.

II. STANDARD OF REVIEW

MCR 2.116(C)(7) permits summary disposition where a claim is barred by an agreement to arbitrate. *Maiden v Rozwood*, 461 Mich 109, 118-119 n 3; 597 NW2d 817 (1999). This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(7) to determine whether the moving party was entitled to judgment as a matter of law. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000). In reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiff's well-pleaded allegations and construes them in the plaintiff's favor. *Id.* This Court must consider the pleadings, affidavits, depositions, admissions, and documentary evidence filed or submitted by the parties to determine whether a genuine issue of material fact exists. *Id.*; MCR 2.116(G)(5). Furthermore, the existence of an arbitration agreement and enforceability of its terms are judicial questions that this Court reviews de novo. *Watts, supra* at 603.

III. ANALYSIS

A. Employment Manual and Receipt and Acknowledgment Form

Defendant argues that the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(7) because the parties agreed to arbitrate any dispute that arose between

them under the arbitration provisions contained in defendant's employment manual and the receipt and acknowledgment form. We agree.

The issue whether the arbitration provisions in defendant's employment manual and the receipt and acknowledgment form require arbitration in this case and preclude plaintiff's lawsuit against defendant is governed by this Court's opinion in *Hicks v EPI Printers, Inc*, 267 Mich App 79; 702 NW2d 883 (2005). In *Hicks*, which involved the same defendant as is involved in the instant case, a panel of this Court determined that the very same arbitration provisions contained in defendant's employment manual[1] and the very same receipt and acknowledgement form at issue in this case were valid agreements to arbitrate and were therefore enforceable. In *Hicks*, the plaintiff, who was an employee of defendant, brought a sexual harassment suit against defendant. *Hicks*, *supra* at 80. The plaintiff in *Hicks* had signed a form acknowledging that she received, read, and understood the employment manual. *Id.* at 83. The receipt and acknowledgment form contained an arbitration provision that was identical to the arbitration provision contained in the receipt and acknowledgment form in the instant case. It provided: "'I understand that any dispute, matter, or controversy as set forth in Section 4.07, shall be settled by arbitration.'" *Id.* Furthermore, as noted above, Section 4.07 of the arbitration provision in the employment manual in *Hicks* was identical, with the exception of one additional word, to the arbitration provision contained in Section 4.07 of the employment manual received by plaintiff in the instant case.

In *Hicks*, this Court affirmed the trial court's ruling that the plaintiff's claims were barred by an agreement to arbitrate. *Id.* at 80. This Court found that the employment manual and the receipt form, each independently and when read together, bound the parties to resolve their disputes by arbitration. Regarding the employment manual, this Court stated:

> In . . . this case, there is an at-will employment relationship, a manual with contractual terms that included mandatory arbitration and the employer's exclusive right to prospectively alter the terms of the relationship, and the fact that the employer made no changes between the beginning and the end of the relationship. The parties in this case had a contract that included a detailed arbitration provision. The provision appeared in large bold-faced text. Finally, the manual's severability clause reflects the understanding that the terms of the manual are meant to be enforceable, 'In the event that any provision in this Employment Manual is found unenforceable and invalid, the finding will not invalidate the entire Employment Manual, but only the subject provision.' Underlying this language is the presumption that the manual contains enforceable

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[1] The language used in the arbitration provision in the employment manual (Section 4.07) in *Hicks* was different from the arbitration provision in the employment manual in the instant case in only one minor respect. In the sentence "EITHER PARTY MUST DEMAND ARBITRATION WITHIN ONE YEAR AFTER THE CONTROVERSY ARISES BY SENDING A NOTICE OF DEMAND TO ARBITRATE TO THE AMERICAN ARBITRATION ASSOCIATION WITH A COPY TO THE OTHER PARTY[,]" the provision in *Hicks* included the word "ALONG" between the words "ASSOCIATION" and "WITH."

> terms. This provision seeks to protect as many of those terms as possible in the event that some terms are invalidated. For all these reasons, the parties intended the manual, including the arbitration provision, to contractually bind them to certain employment terms. [*Id.* at 86.]

Hicks is on point with the facts of the instant case. In the instant case, plaintiff, like the plaintiff in *Hicks*, was an at-will employee of defendant. The employment manual in the instant case contained a nearly identical arbitration provision to the detailed arbitration provision in the employment manual in *Hicks*, and defendant had the exclusive right to prospectively alter the terms of the relationship in both employment manuals. The employment manual in this case also contained a severability clause that was identical to the severability clause in the employment manual in *Hicks*. Therefore, for the same reasons as this Court cited in *Hicks*, we hold that the arbitration provision in the employment manual requires the settlement of plaintiff's claims by arbitration.

In addition, the receipt and acknowledgment form also contains an arbitration provision that is an independent agreement requiring arbitration in this case. In *Hicks*, this Court addressed the effect of the arbitration provision in the receipt and acknowledgment form:

> Even if the manual itself does not create binding arbitration, which we find it does, defendant prevails because plaintiff signed the receipt form, which included a specific provision for arbitration. Specifically, the receipt form provided, 'I understand that any dispute, matter, or controversy as set forth in Section 4.07 *shall* be settled by arbitration.' (Emphasis added.) Admittedly, the top of the form refers to the manual as a guide that 'is not always the final word,' but the next paragraph references the 'mutual . . . responsibilities' of the parties. Furthermore, the bottom of the form states, 'The signed original copy of this *agreement* must be given to your supervisor to be filed in your personnel file.' (Emphasis added.) While the manual and receipt form may leave some questions unanswered, arbitration is not one of them. The receipt form in plain and forceful language requires the settlement of all employment disputes by arbitration."
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> The receipt form clearly states that arbitration will settle all disputes. Section 4.07 appears in the manual in large bold text. Nothing about how the agreement was presented to plaintiff was misleading or confusing. Plaintiff could have easily read the receipt form in conjunction with the employment manual. Both documents straightforwardly described what to expect in terms of dispute resolution by arbitration. Even without reading the two in tandem, the receipt form on its face is an agreement to arbitrate subject to the details appearing in the employment manual. For these reasons, the receipt form, when read together with the employment manual, is an independent agreement requiring arbitration. [*Id.* at 87-88.]

Like the receipt and acknowledgment form in *Hicks*, the receipt form in the instant case contains language referring to the manual as a "guide" and stating that the employment manual "is not always the final word[.]" However, like the receipt and acknowledgment form in *Hicks*,

the next paragraph also references the "mutual . . . responsibilities" of the parties. Furthermore, the receipt form in this case also contains language stating, "The signed original copy of this *agreement* must be given to your supervisor to be filed in your personnel file." Therefore, based on our holding in *Hicks*, we conclude that "[t]he receipt form in plain and forceful language requires the settlement of all employment disputes by arbitration." *Id.* at 87.

Plaintiff asserts that *Hicks* was decided after the trial court denied defendant's motion for summary disposition based on MCR 2.116(C)(7) and after the jury rendered its verdict in this case and that this Court should not give *Hicks* retroactive effect. The trial court denied defendant's motion for summary disposition on March 25, 2003, and the jury returned its verdict on July 29, 2004. This Court decided *Hicks* on April 12, 2005, and did not approve the case for publication until June 23, 2005. Therefore, the issue is whether *Hicks* applies retroactively to the facts of this case.

In general, judicial decisions are to be given complete retroactive effect. *Ousley v McLaren*, 264 Mich App 486, 493; 691 NW2d 817 (2004). However, when injustice might result from full retroactivity, a more flexible approach is warranted. *Gladych v New Family Homes, Inc*, 468 Mich 594, 606; 664 NW2d 705 (2003). This flexibility is intended to accomplish the maximum of justice under varied circumstances. *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997). "[R]esolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy." *Riley v Northland Geriatric Ctr (After Remand)*, 431 Mich 632, 644; 433 NW2d 787 (1988) (opinion by Griffin, J.). Complete prospective application is appropriate only for decisions that either overrule clear and uncontradicted case law or decide an issue of first impression when resolution of that issue was not clearly foreshadowed. *Lindsey*, *supra* at 68; *Ousley*, *supra* at 493.

We hold that our opinion in *Hicks* applies retroactively to the facts of the instant case. First, prospective application is inappropriate because *Hicks* did not overrule clear and uncontradicted case law or decide an issue of first impression whose resolution was not clearly foreshadowed. Second, considerations of fairness and public policy both warrant application of the general rule providing for retroactive applicability of judicial decisions. It would be unfair to interpret the same contractual provisions in *Hicks* as requiring arbitration and barring the plaintiff's lawsuit in *Hicks*, but not requiring arbitration and prohibiting plaintiff's lawsuit in the instant case. Furthermore, in *Hicks*, we ruled in favor of arbitration, and public policy strongly favors arbitration as a means of settling disputes. *Hetrick v Friedman*, 237 Mich App 264, 277; 602 NW2d 603 (1999). Both the Legislature and courts have endorsed arbitration as an inexpensive and expeditious alternative to litigation. *Id.* Therefore, based on considerations of fairness and public policy and the fact that *Hicks* did not overrule clear and uncontradicted case law or decide an issue of first impression whose resolution was not clearly foreshadowed, we hold that *Hicks* applies retroactively to the facts of this case.

We are bound by this Court's holding in *Hicks* because it is a published opinion, and published decisions of the Court of Appeals have precedential effect and are binding under the rule of stare decisis. MCR 7.215(C). In *Hicks*, we interpreted the very same arbitration provisions contained in both defendant's employment manual and in the receipt and acknowledgment form at issue in this case and held that they, both standing alone and read together, created an enforceable contractual right to arbitration. Therefore, in light of *Hicks*, the trial court erred in denying defendant's motion for summary disposition under MCR 2.116(C)(7)

based on the arbitration provisions in the employment manual and in the form, which was signed by plaintiff, acknowledging receipt of the employment manual. We therefore reverse the jury's award of $116,675 for breach of the offer letter, which the jury determined was a contract, and which was based on the arbitration provisions in the employment manual and the receipt and acknowledgment form.

B. The Marketing Agreement

Defendant also argues that the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(7) because the parties agreed to arbitrate any dispute that arose between them under the arbitration provision contained in the marketing agreement.[2] Again, we agree.

The marketing agreement contained a broad and unambiguous arbitration provision, which provided that "[a]ny controversy or claim arising out of, or relating to this Agreement, or its breach, shall be settled by arbitration . . . ." Public policy strongly favors arbitration as a means of settling disputes. *Hetrick, supra* at 277. Arbitration is a matter of contract, and arbitration agreements are generally interpreted in the same manner as ordinary contracts. *Bayati v Bayati*, 264 Mich App 595, 598-599; 691 NW2d 812 (2004). They must be enforced according to their terms to effectuate the intention of the parties. *Id.* Arbitration clauses should be liberally construed to resolve all doubts in favor of arbitration. *Grazia v Sanchez*, 199 Mich App 582, 584; 502 NW2d 751 (1993).

To ascertain the arbitrability of an issue, a court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract. *Huntington Woods v Ajax Paving Industries, Inc (After Remand)*, 196 Mich App 71, 74-75; 492 NW2d 463 (1992). In this case, there is an arbitration provision in the marketing agreement which clearly and broadly provided for arbitration of "[a]ny controversy or claim arising out of, or relating to this Agreement, or its breach . . . ." The marketing agreement specifically provided that defendant "shall pay a commission of 7 percent on the gross amount of sales billed by us, which are the result of [plaintiff's] efforts." Plaintiff's complaint alleged that defendant breached the marketing agreement by reducing plaintiff's commission from seven percent to six percent. Plaintiff's breach of contract claim therefore arose directly out of the marketing agreement. Furthermore, the arbitration provision in the marketing agreement was broad enough to include plaintiff's claim for breach of contract resulting from defendant's reduction in plaintiff's commission to six percent. The disputed issue is therefore clearly within the arbitration clause. Finally, the dispute is not expressly exempted from arbitration by the terms of the marketing agreement.

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[2] Robins Graphics, Inc., and not plaintiff individually, was a party to the marketing agreement contract with defendant. Although Robins Graphics, Inc., was wholly owned, controlled and managed by plaintiff, plaintiff was not personally a party to the marketing agreement. Nevertheless, to the extent that plaintiff claims rights under the marketing agreement, he is subject to the arbitration provision that it contains.

Plaintiff, who had worked in the printing business for over forty-five years and was an experienced businessman, voluntarily signed the marketing agreement, which contained a clear and broad arbitration agreement. Nothing about the arbitration provision in the marketing agreement was misleading or confusing. "Michigan law presumes that one who signs a written agreement knows the nature of the instrument so executed and understands its contents." *Watts v Polaczyk*, 242 Mich App 600, 604; 619 NW2d 714 (2000). Because the arbitration provision in the marketing agreement clearly encompassed plaintiff's claim that defendant breached the marketing agreement by reducing plaintiff's commission, the trial court erred in denying defendant's motion for summary disposition of plaintiff's claim for breach of the marketing agreement under MCR 2.116(C)(7). We therefore reverse the trial court's award of damages to plaintiff in the amount of $52,577 for breach of the marketing agreement.

IV. CONCLUSION

The trial court erred in denying defendant's motion for summary disposition based on MCR 2.116(C)(7). Plaintiff's claims were barred by the arbitration provisions contained in the employment manual, the receipt and acknowledgement form, and the marketing agreement. We therefore reverse the entire judgment of the trial court. In light of our resolution of this issue, we need not address the parties' remaining issues on appeal.

Reversed.

/s/ Michael R. Smolenksi
/s/ Bill Schuette
/s/ Stephen L. Borrello